No. 12278.

In the

United States Court of Appeals

For the Ninth Circuit.

LESTER W. HURLEY,

Appellant,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, LIMITED,

Appellee.

BRIEF ON BEHALF OF APPELLANT.

Appeal from the United States District Court for the Southern District of California, Central Division.

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PAUL P. O'BRIEN,

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THURMAN L. McCORMICK,
910 Rialto Building, K. C., Mo.,
HAROLD EASTON,
633 Roosevelt Building,
Los Angeles 14, California,
Attorneys for Appellant.

SMITH-GRIEVES, LAW PRINTERS, KANSAS CITY, MO.

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STATEMENT OF JURISDICTION

At the time of the commencement of this action and at ıll times herein mentioned, plaintiff was a citizen and ·esident of the State of Missouri.

At the time herein mentioned, defendant was a corporaion organized and existing under and by virtue of the aws of the State of California, with its principal office ınd place of business located in Los Angeles, California.

The amount in controversy between plaintiff and deendant in this action, exclusive of interest and costs, execeds $3000.00. (Petition, Tr. R., p. 2). (Ans., Tr. R., p. 9-21).

Jurisdiction in the trial court was invoked by reason of he amount in controversy and the diversity of citizenship xisting between plaintiff and defendant (28 U. S. C. A., ec. 41) (1).

The jurisdiction of this Court to review the action of he trial court is based upon appeal from said trial court. Notice of Appeal, Tr. R., p. 95; Rules of Civil Procedure, 8 U. S. C. A., Rule 73.)

STATEMENT OF THE CASE

This appeal involves a suit in equity for an accounting rought by Lester W. Hurley, plaintiff below, and appel- nt here, against the Southern California Edison Comany, Limited, defendant below, appellee here, for diviends and stock rights which accrued and were set aside r payment on stock of defendant company owned by e plaintiff, which dividends and stock rights were paid d delivered to Elizabeth J. Price, grandmother of the aintiff, who was also a stockholder in the defendant comny.

The plaintiff alleged in his complaint that the stock, which is composed of two blocks, one for 575 shares of common, and another for 88 shares of common and 191 shares of preferred, was transferred to the plaintiff on November 20, 1928 (Tr. R., p. 3), without his knowledge; that plaintiff first learned of his ownership of said stock on March 18, 1944 (Tr. R., p. 7). That all payment of dividends and delivery of stock rights to Elizabeth J. Price were unauthorized; that all purported assignments and all dividend orders were void or forgeries (Tr. R., p. 8); that plaintiff promptly, upon discovery of said fraud and forgery, disaffirmed said dividend orders and forged assignments (Tr. R., p. 5); that at the time said forgeries occurred, and said dividend orders were executed, plaintiff was a minor 20 years of age (Tr. R., p. 5). That following the establishment by final judgment in the United States District Court in the District of Kansas, of plaintiff's ownership in said stock, this suit for accounting was filed in United States District Court for the Southern District of California, Central Division.

Defendant filed its answer, and alleged "that as a result of the transfer on its books of the said stock described in paragraph 4 of the complaint, and as a result of Dividend Order dated November 19, 1928, relative to the dividends and stock rights on the stock described in paragraph 5 of the complaint, it paid and delivered the said dividends and stock rights to Elizabeth J. Price" (Tr. R., p. 21).

Defendant further pleaded "that defendant denies that said dividends and stock rights, or either of them, were or are owing to plaintiff" (Tr. R., p. 22).

Defendant also filed a supplemental answer (Tr. R., p. 31), but in no manner pleaded or alleged as a defense to this action that payment was made to Elizabeth J. Price, or that said stock rights were delivered to Elizabeth J.

Price as a joint tenant of the plaintiff, and that in consequence thereof, defendant had paid and discharged its obligation to plaintiff under the provisions of Section 1475 of the Civil Code of the State of California.

On these pleadings the case was originally tried in November, 1946, and judgment entered in favor of the plaintiff on October 15, 1947, in Book 46, page 367, for amount of $10,613.79.

Thereafter, and on the 30th day of April, 1948, the trial court entered its order "that defendant's motion for a new trial be and is hereby granted on the single issue as to whether or not defendant knew or had reason to know of the fraud perpetuated upon plaintiff by plaintiff's cotenant, Elizabeth J. Price" (Tr. R., p. 34).

Thereafter, said new trial was had on November 3, 1948, and findings of fact and conclusions of law were again entered in substantial conformity to the original findings of fact and conclusions of law, save and except that Conclusions of Law XI (Tr. R., p. 62) was inserted. The court then, on the basis of the applicability of Section 1475 of the Civil Code of the State of California, entered judgment for the defendant (Tr. R., p. 94).

In Conclusion of Law XII (Tr. R., p. 63) the trial court found the law to be that "If Section 1475 of the California Civil Code were not applicable to this case," the plaintiff would be entitled to judgment as originally entered, and as set out in said Conclusion of Law XII.

The issue therefore before the Court is (1) whether or not Section 1475 of the Civil Code of California was properly before the court at any time since Section 1475 was not pleaded as a defense and (2) did the single issue as to whether or not defendant knew or had reason to know of the fraud perpetrated upon the plaintiff by Elizabeth J. Price, embrace the issue of the applicability of Section 1475 of the Civil Code of California, as a defense, and

(3) disregarding the first two elements, does Section 1475 of the Civil Code of California constitute a defense under the law and the established facts found in the case at bar.

The appellant takes the position that the facts as found, and the declarations of law made, are true and correct, save and except Finding of Fact XXVII (Tr. R., p. 57), and the Conclusions of Law XI and XII (Tr. R., pp. 62-63), which said Finding of Fact and Conclusions of Law are specified as error.

Briefly enumerated and condensed, the established and undisputed facts are:

(1) That the 575 shares and the 88 and 191 shares of stock were on November 20, 1928, transferred to Elizabeth J. Price, George E. Burton and Lester Hurley, as joint tenants, on the books of defendant company (Tr. R., pp. 36-37).

(2) That without knowledge of the purpose or reasons therefor, and at the request of Elizabeth J. Price, plaintiff did sign gratuitously in blank two dividend orders (Finding V, Tr. R., p. 37).

(3) That Dividend Order No. 12743 directed that dividends on the 88 shares and the 191 shares be paid to Elizabeth J. Price (Tr. R., p. 39).

(4) That William Price died in Los Angeles on January 5, 1929, and was returned to Kansas City, Missouri, for burial (Finding VIII, Tr. R., p. 40). That on or about January 19, 1929, Elizabeth J. Price caused assignments for the 575 shares to be sent by the Brotherhood State Bank, of Kansas City, Kansas, to defendant company in Los Angeles, which assignments purported to bear the signatures of Elizabeth J. Price, George E. Burton, and Lester W. Hurley, and purporting to assign to Elizabeth J. Price and George E. Burton said stock. That said as-

signments were returned to the Brotherhood State Bank on January 22, with the request that the *signatures* be guaranteed. That on February 1, said assignments were received in Los Angeles with the signatures of Price and Burton guaranteed, but without a guarantee of the signature of plaintiff. That on February 7, 1929, said assignments were *again* returned to the Brotherhood State Bank with the statement: "We have your letter of the 29th, and are returning *again* the assignments on which we *asked* that you have the signature (not signatures) guaranteed." On February 19, said assignments were returned to defendant company with the transferee designation and the signature of Lester W. Hurley guaranteed, and transfer was then made on the books of defendant company, after which time defendant company failed and refused to recognize that plaintiff had any interest in or control over said stock, either as a joint tenant or otherwise, and dividends and stock rights were thereafter paid to Elizabeth J. Price, to the exclusion of the plaintiff, and not to Elizabeth J. Price, as a joint tenant of plaintiff Hurley (Finding IX, X, Tr. R., pp. 41-42, Pre-trial Stipulation, p. 26).

(5) That all dividends and stock rights listed in Finding XI (Tr. R., p 43) were paid to Elizabeth J. Price under Dividend Order No. 13157 (Tr. R., p. 45). That all dividends set aside and paid to Elizabeth J. Price were paid without notice, knowledge or consent of the plaintiff, although during all of said time plaintiff was the owner of an undivided one-third interest, and entitled to receive one third of all dividends and stock rights (Finding XIII, Tr. R., p. 45).

(6) That on November 20, 1928, plaintiff was a minor; that the existence of said stock, assignments, and dividend orders, and the use to be made thereof, was concealed by Elizabeth J. Price and George E. Burton from the plaintiff, and plaintiff was in complete ignorance of

all of said transactions until after the death of his grandmother, Elizabeth J. Price, on December 27, 1943 (Finding XIV, Tr. R., pp. 45-46-47).

(7) That on March 18, 1944, plaintiff learned for the first time of the fraud, deceit and forgery that had been practiced on him, and he promptly disaffirmed all of said transfers and dividend orders purporting to have been executed by him. Thereafter, suit was filed in the United States District Court of Kansas, and the forgeries of said assignments were established, and judgment entered sustaining plaintiff's ownership in said stock, which judgment became and was final before this action was brought (Finding XVI, XVII, Tr. R., pp. 49-50).

(8) That on October 15, 1945, demand was made on defendant company for the payment of one-third of all dividends and stock rights, but no payment was made (Finding XVIII, Tr. R., p. 50).

(9) That although the 191 shares and 88 shares were at all times recorded on defendant's books, in the name of the plaintiff as joint tenant, and his address recorded, all dividends and stock rights on said shares were paid to Elizabeth J. Price from and after December 11, 1928 (Tr. R., pp. 51-52-53).

(10) That at the time Dividend Orders No. 12742 and 12743 were signed, plaintiff was a minor, and received no consideration for the execution of said orders, and the nature and purpose for which they were used was concealed from him. That plaintiff's disaffirmance of all assignments and dividend orders were made, under the circumstances, in a reasonable time after reaching his majority (Finding XXVI, Tr. R., p. 56).

(11) That under date of January 25, 1929, and thereafter, resolutions were adopted by the defendant com-

pany, which provided that warrants representing stockholders rights to subscribe for and purchase additional shares, be issued in the name of the stockholder and mailed or delivered on or before April 22, 1929, March 25, 1930, and March 25, 1931, together with a letter setting forth the basis and condition on which the right to subscribe may be exercised; that all of said warrants be assignable by indorsement of said warrants (Finding XXVIII, Tr. R., p. 57-58). In disregard, however, of said resolutions, no warrants and no letter or letters were mailed or delivered to the plaintiff. Further, plaintiff indorsed no warrants transferring plaintiff's stock rights. However, defendant company ignored said resolutions and paid all dividends, and delivered all stock rights to Elizabeth J. Price, to the exclusion of the plaintiff (Tr. R., pp. 26, 27, 28).

The appellant takes the position that on the basis of the facts found that the Conclusions of Law XI and XII are erroneous; that under the law, Sec. 1475, Civil Code of California, constitutes no defense; that this appeal has been duly taken from and specifically limited to said erroneous conclusions of law on which said judgment (Tr. R., p. 94) was entered.

SPECIFICATIONS OF ERRORS TO BE ARGUED.

I.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), "that pursuant to the provisions of Section 1475 of the Civil Code of the State of California, defendant discharged its obligations to the plaintiff herein as an owner in joint tenancy of stock in defendant corporation by its payment of dividends to, and delivery of stock rights to, or upon the order of Elizabeth J. Price, joint tenant and obligee," for the reason that payment to one of several joint tenants has not been so pleaded by defendant as to raise the issue, but defendant has so pleaded as to preclude reliance on Sec. 1475, Civ. Code of California, as a defense.

II.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of the fraud practiced on the plaintiff as a co-tenant, and this eliminates Section 1475 of the Civil Code of California as a defense.

III.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that the law is well settled that when a dividend is declared and set aside it is immediately severed from the stock, and title thereto vests in each stockholder individually, and not as a joint tenant, regardless of how the stock may have been held, and thus Section 1475, Civil Code of California, can have no application to dividends declared and set aside for payment.

IV.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, because defendant knew, or had reason to know, of the forgery and fraud perpetrated upon the plaintiff by Elizabeth J. Price and George E. Burton, through notice, both actual and constructive, by receipt of the forged assignments and invalid dividend orders on the basis of which plaintiff was excluded from all payments, thus eliminating Sec. 1475, Civil Code of California, as a defense.

V.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant had actual knowledge as a matter of fact and law that defendant Hurley was being *"excluded"* from the dividends and stock rights, and this exclusion is the "fraud" that is referred o in the exception read into Section 1475 by the decisions.

VI.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) "that neither said dividends or stock rights constituted *deposits* in the hands of the defendant, and are herefore not controlled by the provisions of the California Civil Code relating to deposits," for the reason hat said dividends, set aside, constituted a deposit with efendant and the exception; expressly stated in Section 475 as to deposits, precludes reliance on the section in he case at bar.

VII.

The court erred in its Conclusion of Law XI (Tr. R., . 62), set out above, for the reason that as to the divi-

dends on the 88 shares of common stock and the 191 shares of preferred stock, defendant not only knew or had reason to know that plaintiff was being excluded from said dividends and stock rights, but the defendant actually issued and delivered the warrants representing said stock rights to Elizabeth J. Price and failed to disclose, in violation of its own resolution, information concerning said dividends and said warrants which fraud and secretion eliminated Section 1475 of the Civil Code as a defense.

VIII.

That the trial court erred in its Conclusion of Law XII (Tr. R., p. 63) that plaintiff was not entitled to interest on dividends wrongfully paid to Elizabeth J. Price prior to the date of demand for said payment. Since a prior demand would have been a vain and useless act, such demand under the law was waived and appellant is entitled to interest on each dividend from the date said dividend was declared and set aside for payment.

IX.

That the trial court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant was bound to know that plaintiff was a minor, and Sec. 33, Civ. Code of California, precludes Sec. 1475, Civ. Code, from applying to minors.

ARGUMENT.

I.

The trial court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant failed to so plead payment to one of several joint tenants as to raise said issue but has so pleaded as to preclude reliance on such payment as a defense under Sec. 1475 Civ. Code of California.

At the outset we desire to direct the Court's attention to the fact that appellant, plaintiff below, was and is entitled to have this cause of action determined on the basis of the allegations of the plaintiff's complaint and the defenses pleaded by the defendant company. We take the position that it is not incumbent on the appellant to establish the fact that some defense not pleaded would not constitute a defense, even had it been properly and timely presented for determination.

Before the defense, now relied on by the defendant, that the defendant discharged its obligation to the plaintiff by payment of the dividends and delivery of the stock rights to Elizabeth J. Price as a joint tenant can properly be considered as a defense by this Court, the defendant is obligated to show that such defense was properly pleaded, as well as the existence of all those elements essential to establish its applicability to the fund involved in this suit.

Now, however carefully the defendant's answer, together with defendant's supplemental answer, may be searched, no allegation will be found therein that alleges or purports to allege that the fund (dividends and stock rights) here in suit was owned or held by joint tenants, and that in performance or discharge of the defendant's obligation to pay said dividends and deliver said stock rights, that it did so pay said dividends and deliver said stock rights to one of said joint tenants, without knowl-

edge or notice that plaintiff was being excluded from participation or benefit therein.

On the contrary, the entire defense brought forward by the defendant was predicated, first, on the legality and genuineness of the forged transfers of the stock certificates, as a result of which forged assignments, said stock was transferred by the defendant upon the books of the company, thus eliminating plaintiff's entire interest in said stock either as joint tenant or otherwise (Tr. R., p. 21) and second, on the validity and genuineness of Dividend Orders No. 12743 and 13157, by the terms of which, payment to Elizabeth J. Price as an individual and not as a joint tenant of the plaintiff was authorized (Tr. R., pp. 26-27). Further in this connection it will be noted that nothing is alleged to be contained in these dividend orders that in any manner authorized the delivery of stock rights owned by plaintiff to Elizabeth J. Price.

In other words the defense alleged was that a valid transfer of all interest belonging to the plaintiff had been made to Elizabeth J. Price, and that plaintiff no longer had any interest in or connection with the dividends in question, personally, as joint tenant, or otherwise; that "said dividend payments were made and said stock rights delivered upon the authority of, and in pursuance of Dividend Order No. 12743, dated November 22, 1928" (Tr. R., p. 27). (Ans., pars. 12-13, Tr. R., p. 21-22.) (Pretrial Stip., par. 4, Tr. R., p. 26.)

Defendant alleges in paragraph 13 of its answer: "That defendant denies that said dividends and stock rights, or either of them, were or are owing to the plaintiff." It is evident that this allegation could not be true if the defendant considered that plaintiff was a joint tenant and a joint obligee during any of the time that said dividends had been declared and set aside for payment, or said stock rights authorized. Except for the assignments and divi-

dend orders, said dividends and said stock rights were owing to the plaintiff to the same extent, and in the same manner, as they were owing to Elizabeth J. Price.

It is held in *Stark* v. *Coker,* 20 Cal. (2d) 839, l. c. 844, that "one of the characteristics of joint tenancy is equality of the interest held by the respective tenants (Civ. Code, Sec. 683)." If, therefore, the dividends were not owing to the plaintiff, they were not owing to Elizabeth J. Price, or George E. Burton, and the absurdity would be reached that they would not be owing to anybody.

Not only was it found by the court that the dividends and stock rights were paid and delivered to Elizabeth J. Price, pursuant to assignments and dividend orders, as pleaded by the defendant (Finding XII, Tr. R., p. 45), but in plaintiff's Exhibit 31 the written admission by defendant appears that:

> "In each of the years 1929-1931, inclusive, it also issued to her (Elizabeth J. Price) 575 shares of common stock rights. * * * In each of the years 1929-1931 it issued to her 88 shares of common stock rights."

Thus it appears that the defendant not only pleaded payment and delivery of dividends and stock rights to Elizabeth J. Price, but that even the stock rights, which were represented by warrants, were *issued* to Elizabeth J. Price, not as a joint tenant of the plaintiff, but to the exclusion of the plaintiff, and in direct violation of resolutions passed by the Board of Directors of the defendant (Finding of Fact XXVIII, Tr. R., p. 57).

It follows that the defendant not only failed in the defense pleaded and relied on, but has so pleaded as to preclude the defense on which it now attempts to rely, which defense we will hereafter show likewise constitutes no defense.

The situation here presented is one where defendant pleads and attempts to prove a defense based on the premise that the plaintiff has no interest or ownership in the dividends in suit of any kind or character whatsoever, and then when this defense is ruled against it, it seeks to rely on a defense based on the premise that the plaintiff did have an interest and ownership in the dividends and stock rights of a special and particular kind, namely, that of joint tenant.

The fundamental basis, therefore, of the defense on which the defendant now seeks to rely is in direct repudiation and contradiction of the state of facts which defendant pleaded and attempted to prove. The defendant is in the position of denying plaintiff's interest and ownership, due to alleged assignments (Defendant's Ans., pars. 12-13, Tr. R., pp. 21-22), and now confessing said interest and ownership, and seeking to avoid it. This cannot be done.

49 C. J. 293 states the rule:

> "A plea in confession and avoidance, or an answer setting up new matter which should set forth such further facts as, if true, would defeat plaintiff's right to recovery. A plea which confesses, but which does not set up matter in avoidance is bad."

In this connection it must be borne in mind that the defendant has in no manner pleaded the facts relied upon as an avoidance of its obligation to the plaintiff. While payment to Elizabeth J. Price is still relied upon, such payment is not now relied upon as having been made to Elizabeth J. Price as the assignee of plaintiff, as in defendant's answer alleged, but on the contrary defendant now takes the position that plaintiff's interest was not assigned, or his ownership transferred, but that defend-

ant at all times dealt with the dividends and stock rights as a fund in which the plaintiff retained his interest and ownership as a joint tenant.

21 R. C. L., Section 129, p. 117, states the law to be:

> "A plea of payment must allege the facts on which it is based, and if it does not do so, it will be held bad on demurrer."
>
> *Hancock* v. *Yarden,* 120 Ind. 366, 23 N. E. 253.

Pleading a defense requires the allegation of the facts as to what was done by the defendant, which is relied upon as a defense to plaintiff's cause of action. When such facts are alleged, it is universally held that they are binding on the defendant, and cannot be blandly repudiated and disregarded at a later date as may seem advantageous or convenient.

49 C. J. 122, Sec. 121, states this rule as follows:

> "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader * * *. It follows that a party cannot subsequently take a position contradictory of or inconsistent with his pleadings, and the facts admitted by the pleadings, are taken to be true for the purpose of the action."

Again in 21 C. J. 482, Sec. 564, it is stated:

> "Plaintiff is entitled to the benefit of all the admissions made in the answer. Where a fact is alleged in the bill and admitted in the answer the admission is conclusive. The facts admitted are not in issue, and so need not be proved, nor can they be called in question or disproved." *Pugh* v. *Fairmount Gold, etc., Min. Co.,* 112 U. S. 238, 5 S. Ct. 131, 28 L. Ed. 684.

Now, when we attempt to apply the present position of the plaintiff to the facts, we are immediately brought into violent conflict with the facts that stand established in this case. If it can be assumed, which we deny, that such payment was made to Elizabeth J. Price, as a joint tenant, this position of necessity, embraces and includes as a part thereof recognition by the defendant of the plaintiff at all times as a joint tenant in the fund in suit. The established facts show, however, the plaintiff's name was removed from the books of the company as a joint tenant of the 575 shares of stock (Finding IX, Tr. R., pp. 41-42), and Dividend Order No. 12743 was filed and acted upon, and stock rights issued, not to the plaintiff, but to Elizabeth J. Price (Finding XIX, Tr. R., pp. 51-52-53).

Thus, not only does it appear that the position of the defendant now taken is contradictory of the defense pleaded, but the facts as found are contradictory of the defense now relied upon by the defendant.

We assert that the position of the defendant may be illustrated by taking a typical joint tenant situation. Assuming that A owes a note to B and C jointly. A decides to pay the note and he says to B: I am going to pay this note to you, to the exclusion of C, as it appears that C has assigned his interest in this note to you anyway. A pays the entire note to B. Then C sues A, and A answers that he did pay the note to B as the entire owner, with no intention that C should in anywise benefit from said payment. A further pleads that B has an assignment from C, legally conveying C's interest to B, and that C does not own, and did not own, at the time payment was made, any interest in the note of any kind or character.

The case is tried, and it is established that B does not have a valid assignment from C, and all defenses pleaded fail, and judgment is entered for C. After this occurs, A takes the position that although he did plead that he made

the payment to B individually, and in disregard of, and to the exclusion of C, he now claims the facts to be that he made payment to B, not in disregard of, or to the exclusion of C, but that he paid B as a joint tenant of C.

Can anyone say that such a situation does not embrace the repudiation and contradiction of what A did by asserting different action, for the purpose of changing the legal effect of the action previously alleged and admitted? We assert that in such a case, A would stand committed by his pleadings, and would not, and should not, be later heard to say that payment was made to B for a different purpose, and in a different capacity, than that in which it was alleged, pleaded and admitted.

The defendant is precluded and estopped from relying on the defense of payment to one of two joint tenants, since it pleaded in its answer and admitted that payment was made to Elizabeth J. Price, to the exclusion of the plaintiff, and such payment was intended to be so made. The nature of the payment and the party to whom made was fixed at the time it was made.

The same principle applies to an obligor that direct application of the payment to one debt, and then later decides that it is more desirable to have application made to a different debt. The obligor is bound, and cannot exonerate himself, by then attempting to switch the application to a different debt. This rule is stated in 21 R. C. L., Sec. 94, page 90, that:

> "When one of the debts or items of account is illegal, and the other valid, the debtor may, at his option, apply a debt to either. In such case, an appropriation upon the illegal claim is as valid and binding on the debtor as if it were legal, and he cannot subsequently, without the creditor's consent, change it and have it applied to the legal demand."

II.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that defendant's present claim of payment to one of several joint tenants convicts defendant of actual knowledge of fraud practiced on plaintiff by his co-tenant and this eliminates Sec. 1475, Civ. Code of California, as a defense.

In considering further defendant's reversal of position as to whom payment was made, the question immediately arises as to when defendant first decided and determined that it was making payment of the fund in question to Elizabeth J. Price as a joint tenant of the plaintiff.

The Court will note that by the finding made by the court in this cause, it is found that a transfer of plaintiff's interest in the 575 shares of stock was made on the company's books on February 19, 1929 (Finding of Fact IX, Tr. R., p. 42), and Dividend Order No. 13157 (on which plaintiff's name did not appear), and Dividend Order No. 12743 was received by the defendant on December 11, 1928 (Finding X, Tr. R., p. 42, and Finding VII, Tr. R., p. 39).

The first payment made to Elizabeth J. Price on the fund in suit on Dividend Order No. 13157 was made after date of said order, namely, March 18, 1929 (Finding XII, Tr. R., p. 45, Finding XX, Tr. R., p. 53).

It therefore clearly appears that every dollar paid to Elizabeth J. Price involved in this suit was made after the dividend orders and assignments were received, held by defendant to be valid, and transfer made to Elizabeth J. Price and George E. Burton on the books of the defendant company.

In this connection it must be remembered that the defendant company had duties to perform that were binding on it when these dividend orders and assignments

were received. It could not throw them in the file and say: "We are not going to bother with these dividend orders or assignments, or decide anything about them. We don't care whether they are valid or invalid. The stock is held in joint tenancy and that is enough for us."

The defendant was bound to act at its peril to exercise due diligence in protecting the interests of its stockholder.

The case of *Tafft* v. *Presidio R. R. Co.,* 84 Calif. 131, 24 Pac. 436, declares the law to be:

> "The bank or other corporation, and also defendants, are trustees to a certain extent to the stockholders—that is for the protection of the individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation."

Again, in the case of *Cooper* v. *Spring Valley Water,* 171 Calif. 158, 153 Pac. 936, the court said:

> "The company with respect to its capital stock issued and delivered to third persons, and with respect to conflicting claims of different persons to the same stock, and the right to each to have a transfer thereof, occupied a fiduciary relation to both. Its action in transferring the stock would operate to clothe the transferee with apparent legal title to the stock. It was therefore bound to exercise good faith in its determination of the matter."

It is evident that when said assignments and dividend orders were received, the defendant company was duty-bound to decide how they would be treated. If they were valid, the joint tenancy between Elizabeth J. Price and the plaintiff Lester Hurley was ended. To end this joint

tenancy and convey the interest of Hurley was the manifest object and purpose of the instruments. If the company accepted them and acted on them as valid assignments, it would be compelled to proceed on the basis that the plaintiff had no further interest in said dividends and stock rights, and the joint tenancy was ended accordingly. Payment thereafter would have to be made to Elizabeth J. Price as the legal successor and assignee of the plaintiff's interest.

In other words, the defendant either recognized the plaintiff as a joint tenant, after the receipt of said assignments and dividend orders and disregarded the assignments and dividend orders as invalid, or it accepted the dividend orders as valid and thereafter refused to recognize the plaintiff as a joint tenant. How could it do both?

If, on the other hand, it paid Elizabeth J. Price as a joint tenant of plaintiff (as now asserted), it could only do so on the basis that plaintiff's interest and ownership had *not* ended, but was still recognized by the company. The only basis on which the plaintiff's interest as a joint tenant could have continued would be on the basis that the assignments and dividend orders were invalid and were so considered by the defendant.

Consequently, defendant had to disregard the assignments and treat them as invalid if it did what it asserts, namely, made payment to Elizabeth J. Price as a joint tenant of the plaintiff, Lester W. Hurley. This, of necessity convicts the defendant of knowledge that the assignments and dividend orders were illegal and fraudulent, and known to be so by the defendant, to justify such action on the part of the defendant. If it considered the assignments valid, it would have had no reason to make any payment to Elizabeth J. Price as a joint tenant of plaintiff.

We submit, therefore, that if the defendant company paid Elizabeth J. Price as a joint tenant, after having decided (as it must have done) in order to make payment to Elizabeth J. Price as a joint tenant that the assignment and dividend orders furnished by Elizabeth J. Price were illegal and invalid, it would be paying a joint tenant with the knowledge of the fraud Elizabeth J. Price was attempting to perpetrate on her co-tenant, Lester W. Hurley, through said fraudulent assignments, and defendant for this reason alone would not be exonerated by such payment, and Sec. 1475, Civ. Code of Calif., could in no manner constitute a defense. Restatement of Contract, Sec. 131 (2).

III.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), set out above, for the reason that when a dividend is declared and set aside, it is immediately severed from the stock and title thereto vests in each stockholder individually, and Sec. 1475, Civ. Code, can have no application.

We earnestly direct the Court's attention to the fact that the fund involved in this case is not just a fund derived from personal property charged to be held in joint tenancy. The fund (dividends) involved herein falls in a special class and is therefore subject to the special rules, limitations and controls fixed by the law relative to dividends only. The funds out of which dividends can be paid, the time when dividends vest in stockholder, the distinction between dividends and earnings, as well as distinction between dividends and the aggregate corporate property are determined and controlled, not by the general law relative to income from personal property, but by the law applicable to corporate dividends alone.

It follows that the law dealing with dividends and their ownership constitutes the law to which we must look to determine the nature of the title or ownership of the parties interested in the fund involved in this suit. The fundamental question arises, therefore, whether or not the dividends claimed by the plaintiff constitute a fund which was held or owned by the plaintiff jointly with Elizabeth J. Price and George E. Burton, so as to make the payment of said fund to one a discharge of the obligation to all.

This question cannot be answered by assuming, as has been done in this case, that funds in the form of dividends derived from stock held in joint tenancy, although declared and set aside, as a matter of course constitute a fund, likewise held in joint tenancy (as joint creditors) and consequently, Section 1475 of the California Civil Code applies.

As pointed out above, it is not properly the burden of the plaintiff to establish that the California Civil Code, Section 1475, does not apply, but it is the primary burden of the defendant to plead and prove that it does apply, as this was the defense upon which the defendant in finality relied. To support this burden it is imperatively necessary for the defendant to establish under the law that dividends declared and set aside by the defendant on stock held in joint tenancy, constitutes a fund owed to joint tenants as *creditors*. Further, that the payment of said fund was made in good faith to Elizabeth J. Price and not with callous disregard of plaintiff's rights as a co-obligee (if he was a co-obligee); that said payment was made for the benefit of all co-obligees, and not Elizabeth J. Price alone, as alleged in defendant's answer and as admitted by defendant in pretrial stipulation (Tr. R., pp. 26-27-28).

The law is well established that joint tenancies are looked upon with disfavor under the law, and it cannot be assumed that when stock is held in joint tenancy that the law has established that the scope of joint tenancy is such that it reaches out and impresses upon or imparts to the dividends derived from such stock, the joint tenancy and joint creditors status, in the dividends so declared. Both the logic and the rulings on the point are all to the contrary and fail to support the theory that when stock is held in joint tenancy this form of holding follows the dividends when declared and set aside and imparts to such dividends the same form of holding or ownership as that by which the stock itself is held.

It has been repeatedly held that dividends do not even follow the ownership of the stock itself after they have been declared and set aside for payment. To get clearly before the Court the line of demarkation that has been laid down by the law as between stock and dividends, let us assume that A owns stock in a corporation; that a dividend is declared and set aside for payment on December 8, 1948, payable December 20, 1948. A assigns his stock to B, December 9, 1948. B gets the stock, but the dividends so declared remain the property of A. This is true although B is the unquestioned owner of the stock when the dividend is paid and is therefore entitled to full possession and control of said stock.

In the case of *Wheeler* v. *Northwestern Sleigh Co.*, 39 Fed. 347, the plaintiff was the owner of shares of stock in a corporation which he sold to Chapman and Goss. At the time the stock was sold a dividend had been declared thereon, viz., March 1, 1886, payable May 1 and July 1, 1886. The defendant paid the dividend to Chapman and Goss and thereafter plaintiff brought his suit to recover the dividend. The court said:

> "By the declaration of a dividend, however, the earnings to the extent declared are separated from the general mass of the property and appropriated to the then stockholders who become creditors of the corporation for the amount of the dividend. * * * The earnings represented by the dividend, although the fruit of the general property of the company are no longer represented by the stock but become a debt of the company to the individual who at the time of the declaration of the dividend was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of the dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be passed with the stock by special agreement but not otherwise. The dividend would pass as an incident of the stock * * * the dividends are earnings growing out of the stock, but when declared are immediately separated from it and exist independently of it. They are happily likened in the case last cited to fallen fruit, which does not pass with the sale or gift of the tree. * * * Judgment for plaintiff."

McLaren v. *Planing Mill Co.,* 117 Mo. Apps. 40, 93 S. W. 819, l. c. 822, involved a suit by the plaintiff to compel the defendant to pay a dividend which defendant company, after passing a resolution declaring the same sought to rescind and nullify. The court held:

> "From these considerations we are persuaded that the mere declaration of the dividend itself, without the setting aside of the fund creates a debt and that when the learned text-writers, *supra,* employ the terms 'set aside,' 'set apart,' and 'actually set apart,' as above pointed out, they proceed upon the theory and principle, *supra,* that the act of declaring a dividend, operating as it does, as an actual *severance* of the *dividend from the stock* and corpus of the corpo-

rate property and estate, is *ipso facto,* in and of itself, the setting apart, setting aside, and segregating such dividend in the sense that it creates an immediate right of the stockholder to demand and recover the same when due, inasmuch as *thereby it is actually severed* and segregated from the other property."

On this point the court said:

"Wherefore it appears that the principle obtains that the mere declaration of the dividend, without more, by competent authority under proper circumstances, creates a debt against the corporation in favor of the stockholder the same as any other general creditor of the concern; whereas, *the setting apart of a fund after or concurrent* with the declaration, out of which the debt thus created is to be paid, passes one step further toward securing the payment of the *identical fund* to the shareholder inasmuch as the law treats the setting apart of such fund as a payment to the *corporation as a trustee* for the use of the stockholder, on which fund the stockholder has a lien, and to which fund he has rights superior to the general creditor * * * the doctrine is that by the mere declaration, the dividend becomes immediatly thereby *separated and segregated from the stock and exists independently of it;* that the right thereto becomes at once immediately fixed and absolute in the stockholder, and from thenceforth the right of *each individual stockholder is changed by the act of declaration* from that of partner and part owner of the corporate *property to a status absolutely adverse to every other stockholder and to the corporation itself, insofar as his pro rata proportion to the dividend is concerned.*" (Citing many cases.) (Emphasis ours.)

The rule was laid down in *Smith* v. *Taecker,* 133 California App. 351, 352, 24 Pac. (2d) 182, where the court said:

"Upon the declaration of a dividend by the Board of Directors of a corporation, the share of each stock-

> holder, *vests* in him as *an individual.* (Citing cases.) It makes no difference when the assets were accumulated. 14 C. J. 818. It is universally held that a mere declaration of a dividend creates a debt against a corporation in favor of the stockholders, *as individuals.*" (Emphasis ours.)

It will be noted that in the case of *Smith* v. *Taecker, supra,* that the court specifically holds that when a dividend is declared, the share *vests* in him *as an individual.* This language cannot be construed to mean that when a dividend is declared it vests in each stockholder his share in the dividend in the manner and form in which said stock was held on which said dividend was declared. When debts are created in favor of stockholders as *individuals* it is difficult to understand how their individual holdings can be turned into a joint tenancy automatically and without any action on the part of the individuals involved. As above indicated, the plaintiff who was the owner of the stock on the day the dividends were declared was held to be entitled to the dividends and not the subsequent transferee of the shares.

In the case of *Jerome* v. *Cogswell,* 204 U. S. 1, l. c. 7, 8, the court said:

> "The right to receive what might ultimately be realized from the fund set apart became therefore irrevocably vested in those who were shareholders on June 9th, 1900, and their assigns are now entitled to whatever is to be distributed from it."

Again, let is assume that A owns stock. A dividend is declared and set aside December 8, 1948, payable December 20, 1948. A, by specific bequest, wills said stock to B. A dies December 9, 1948. B, under the will, gets the stock,

but the dividends go to the residuary estate of A, and B has no title or interest in said dividends.

De Gendre v. *Kent, L. R.,* 4 Eq. 283 (1867), was a case in which a dividend was declared upon certain shares of stock held by testatrix and declared payable on July 15, 1865, and Jan. 15, 1866. Testatrix died on the 31st day of December, 1865. The court held:

> "As soon as the dividend was declared, although payment, for convenience of the company, was postponed until the following January, from that moment the testatrix became entitled to it, although she could not have then recovered it, and it would have passed to her legatee and she specifically bequeathed it. I cannot distinguish it from the case of a bill of exchange at six months given by the company, upon which, although payment, for the convenience of the company, is postponed, a present claim would arise. This dividend, therefore, which was earned in the lifetime of the testatrix, though declared payable at a future time, was a debt due to her at the time of her death, and formed part of the corpus of her estate. She has given the tree to the plaintiff, but as to this particular fruit it seems to have fallen during her (testatrix) lifetime."

In the case of *Brundage* v. *Brundate,* 60 N. Y. 544, the will of B bequeathed to S 10 shares of stock in N. Y. C. R. R. Co. The company, after the execution of the will and before testator's death, issued to its stockholders what were styled "interest certificates." In an action by the legatees to compel delivery of said interest certificates in connection with the stock certificates, it was held that the

> "legatee took the specific number of shares of stock as they were at the time of the testator's death and could claim no right to, or interest in, the certificates."

The court further held:

> "And where he has bequeathed shares of capital stock, as such, no dividends thereon declared and received by him in his lifetime passed to the legatee of the stock, as attached or accessory thereto. If the testator in this case had made just the bequest he did make of these shares of capital stock, and had also, in expressed terms, made bequeset to a different legatee of these certificates, can there be any doubt but that if they are valid instruments, they would have passed to that legatee?"

In the case of *Sanitarium* v. *McCune,* 112 Mo. Apps. 332, l. c. 336, 87 S. W. 93, the court declares the law to be:

> "The general rule stated in the briefest way is that a dividend belongs to the one who is the owner of the stock at the time when the dividend is actually declared, irrespective of the time when it is earned, although it may be made payable at a future date (citing many cases). * * * Indeed the law is well settled to the effect that he who owns stock at the time the dividends are declared, owns also the dividends and it is immaterial when the dividends accrued, whether before or after the death of the testator, as the time the law fixes in adjusting the ownership of the dividends is the time when the dividends were declared and thus *severed* from the stock of which theretofore they are treated as incident and if there was in this case a bequest of the bank stock, there would be no difficulty in agreeing with appellant in its contention." (Emphasis ours.)

In the matter of Kernochan, 104 N. Y. 618, 11 N. E. 149. In this case by the will of N, a trust fund was created by the terms of which the executors of said trust estate were authorized "to receive the rents, interest, and income," for the use of testator's widow during her life-

time, remainder to beneficiaries named. The trust included certain shares of stock on which stock on April 14, 1881, a dividend of $25,000 was declared, payable May 2, 1881. The testator died the night of April 20, 1881.

Held:

> "That as soon as the dividend was declared the owner of the shares is entitled to it, and it became a part of his estate; and that the dividends to which the life tenant was entitled as income were only those declared after the testator's death."

Thus we see that whether by will or conveyance the dividends when once declared and "set aside" are not carried over to the new owner of the stock. The dividends remain as a part of the *personal property* of the owner of the stock at the time the dividend is declared. Further, when the dividend is not only declared but "set aside" for payment it becomes a *special fund* or *deposit paid to the corporation* and held by the corporation for the stockholders. The stockholder is entitled to "payment of the identical fund." *McLaren* v. *Planing Mill Co.,* 117 Mo. App. 40, 93 S. W. 819.

The reason for the course dividends take is clear. A *severance* occurs between the stock and the dividends the moment the dividend is declared and the dividend immediately and instantly *vests* irrevocably in the *individual* stockholder and exists *thereafter separate and apart from the stock.* It cannot be carried forward by a sale or bequest of the stock because it is no longer a part of the stock, has no relation to it, and is in no manner connected with it.

If the dividend exists separate and apart from the stock so that it cannot even be conveyed or assigned by the sale of the stock itself or by will of the stock itself,

by what reason can it be said that it is any longer controlled or affected by the form of ownership of the stock from which it has been *severed,* separated and segregated? The form of ownership in which the stock is held could have no more effect upon the form of ownership of the dividends when *once declared and set aside* than could the joint ownership of one piece of property held by A and B control or affect the form of ownership of another and separate piece of property owned by A and B as partners or as individuals.

Now, let us further assume A, B and C own stock in joint tenancy. A dividend is declared and set aside on December 8, 1948, payable December 20, 1948. C dies December 9, 1948. The stock goes by right of survivorship to A and B, but the one-third share of the dividends does not pass by survivorship to A and B but goes to the heirs or *legatees of C.*

The case of *Walmsley* v. *Foxhall,* 40 L. J. Chancery, 28, reported in Law Journal, 1871, new series, 40 Equity, *is decisive of the question here involved.* In this case a joint tenancy was created in favor of several parties by the terms of which the income was payable to said parties during their joint lives. The income was accumulated and upon the death of one of said joint tenants the question was raised as to whether *his personal representative* was entitled to his share or whether the whole belonged to the survivors. We quote the short opinion, which is as follows:

> "Lord Romily, M. R., Nov. 19, 1870—Joint tenancy —Income—Right of survivors. A joint tenancy in income is severed as to each installment as it becomes payable, without actual payment.
>
> A fund was settled upon trust to pay the income thereof to a number of infants during their joint lives. During their infancies the income for many

> years was accumulated. One of them having died, the question was raised whether his personal representative was entitled to a share of the accumulations or whether the whole belonged to the survivors. Mr. Nalder submitted the question that the infants were joint tenants of the income and there had been no severance.
>
> Mr. Cates appeared to support the contrary view but was not heard.
>
> The Master of the Rolls was clearly of opinion that as soon as any part of the income became payable, the joint tenancy in that part was *severed,* and consequently that the personal representative of the deceased was entitled to a share of the accumulations." (Emphasis ours.)

It follows that if the right of survivorship cannot carry the dividend, once declared and set aside, over to the survivor, it is clear that the dividend when once declared *is not held in joint tenancy* but that a *severance* has immediately occurred upon its declaration.

In this connection we call attention to the definition of severance as stated in Black's Law Dictionary, page 1088:

> "In estates. The destruction of any one of the unities of a joint tenancy. It is so called because the estate is no longer a joint tenancy but is severed."

Joint tenancy may be broken (severed) and the joint tenancy status destroyed, even by conveyance by one of the joint tenants to a stranger. *Oberwise* v. *Poulos,* 124 Cal. App. 247, 12 Pac. (2d) 156, l. c. 158.

The frequent and recurrent use of the term *severance* by the courts in declaring that "when the dividends were declared and thus severed from the stock" leaves no doubt as to the meaning of the language and its significance in terminating any further possible claim that a joint tenancy continues to exist therein.

In England, where the rule embodied in Civil Code of California, Section 1475, is recognized, the court nevertheless refused to extend it to apply where a trust or charge was involved. *Matson* v. *Dennis,* 46 E. Rep. 952 (1864), 4 DE. S. J. and S. 345.

The court said:

> "The deed of conveyance was, however, only executed by one of them, and he signed a receipt indorsed on the deed, acknowledging by such receipt the payment of the 3000-L "to us." The deed was not executed, nor was any receipt signed by Mr. M'Leay, who is not proved to have been dead at the time, nor is he indeed proved to be now dead.
>
> The question is, whether when an equitable charge is vested in two persons—*and as I will assume as joint tenants*—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate.
>
> In my judgment, and in the absence of special circumstances such as are not shown to exist in the present case, *that cannot be done.* The purchaser is entitled to have it taken here, that Mr. M'Leay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity." (Emphasis ours.)

The case of *Swartzbaugh* v. *Sampson,* 11 Calif. App. (2d) 451, 54 Pac. (2d) 73, declares four elements must exist for the creation of a joint tenancy, namely:

> "Unity of interest, unity of title, unity of time, unity of possession. *But the distinguishing incident is a right of survivorship.* (1 Cruise 359, Sec. 27; 2 Crabb's Real Property, Sec. 2306). * * * An estate in joint tenancy can be severed by destroying one or

more of the necessary unities, either by operation of law, by death, etc.'' (Emphasis ours.)

It is evident from all of the cases on the point, both in California and elsewhere, that the ''distinguishing incident —right of survivorship''—does not exist as to dividends declared and set aside. This fact alone is decisive as to the applicability of Civ. Code 1475 to the fund involved herein.

All the cases on the question, as well as the logic of the situation, conclusively establishes that while the right of survivorship in stock held in joint tenancy will carry to the survivor, the stock as well as the dividends declared *after* the stock is passed by survivorship, the rule of survivorship can in no manner pass the dividends *declared before,* for the very good reason that when the transfer by survival takes place, the prior declared dividends have been *severed* from the stock and are not a part of the property upon which the right of survivorship operates.

Now, as indicated in the authorities above cited, a dividend has been happily likened to the fallen fruit from a tree. The sale, conveyance or gift of the tree does not carry with it title to or ownership in the fallen fruit. If ownership in the fallen fruit (dividend) by sale, conveyance or gift of the tree (stock) does not pass, then how can the form of ownership by which the tree was held be imported or attached to the fallen fruit (dividend)?

No California case has been found that lays down any different rule than those stated in the cases above cited.

The case of *Fish* v. *Security-First National Bank,* 31 Calif. (2d) 378, 89 Pac. (2d) 10, has been referred to as holding that dividends from stock held in joint tenancy retain a joint tenancy character. This case does not so hold.

In the *Fish* case, *supra,* no dividends from stock declared and set aside were involved. In May, 1942, 1,000 shares of stock were issued in joint tenancy. In October, 1942, the stock was sold and payment made therefor to one of the joint tenants in her own name. This payment was then loaned back to the company and a note taken therefor. The issue arose between the surviving joint tenant and the personal representative of the deceased, and not between the obligor and the excluded joint tenant. The question, therefore, in the *Fish* case, *supra,* was whether or not the proceeds derived from the sale of the stock itself and thereafter invested in other property retained its joint tenancy status. The holding that it did could, well be, correct, but this does not touch the question in the case at bar.

The fund here in question is not proceeds from the sale of joint tenancy stock, but dividends declared and set aside on the stock. This is a very different thing. Interest on a note held in joint tenancy is not controlled by the same rules as dividends on stock. It has never been held that the sale by endorsement and delivery of a note would not carry to the purchaser the due and unpaid interest. However, it is well settled that the sale of stock will not carry to the purchaser the declared and unpaid dividends on the stock so sold, endorsed and delivered.

It is apparent that on the sale of the stock the proceeds derived from the sale stand in the place of the stock itself. However this may be, it does not follow that because the proceeds derived from the sale of the stock and reinvested retain the status of the corpus of the property from which the fund was derived, that dividends declared and set aside, and thereby separated, segregated and severed from the stock, so that they do not even follow the ownership of the stock, whether said ownership be obtained by sale, gift

or survivorship, that such fund is impressed with the joint tenancy status.

The cases above cited establish the general rule on the question, with no exceptions stated. Further, *Walmsley* v. *Foxhall, supra,* declares the same rule with respect to joint tenancy.

It further appears from all the cases on the point that when a dividend is not only declared but *set aside* for payment, a trust is immediately created and the corporation is held to have paid the fund to the corporation for the benefit of the individual stockholder. The corporation becomes a trustee or stakeholder of the fund and the relationship of debtor and creditor has ceased and that of trustee and *cestui que trust* established. The *cestui que trust* (stockholder) then has rights therein superior to general creditors.

All that has been said above clearly applies to all cash dividends on the 575 shares as well as the 88 and 191 shares. As to the stock rights, a joint tenancy at no time ever existed in these rights as the ownership therein was fixed by resolution (Finding XXVIII, Tr. R., p. 57) in each stockholder, to be evidenced by warrants transferrable by endorsement only.

We submit that Section 1475, Calif. Civil Code, has no application.

IV.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), because the defendant knew or had reason to know of the fraud practiced on plaintiff by receipt of forged assignments and invalid dividend orders which carried notice and knowledge *ab initio* to defendant, and this eliminates Sec. 1475, Civ. Code, as a defense.

It is a well-established principle of law that fraud vitiates everything it touches.

Restatement of Contracts, Sec. 131 (2d), page 149, applies this principle and states the exception that exists with respect to the application of Section 1475 of the Civil Code of California. Restatement of Contracts, Section 31 (2) declares the rule to be:

> "A discharge of the promissor by an obligee in fraud of a co-obligee is inoperative to discharge the promissor's duty to the extent of the co-obligee's interest in the performance, if the promissor gives no value, or knows, or has reason to know of the fraud."

(A) Defendant had notice or actual knowledge of fraud.

In the case at bar numerous circumstances were established that disclosed that the defendant did have actual notice or knowledge that fraud was being perpetrated on the plaintiff by Elizabeth J. Price and George E. Burton. Limiting reference to those elements which are before this Court by the findings made, we direct the Court's attention to the unusual circumstances that surrounded the forged assignments which occurred at the outset of this fraudulent transaction.

Finding of Fact IX (Tr. R., p. 41) discloses that the assignments on the 575 shares of stock were made up and purportedly executed at the Brotherhood State Bank of Kansas City, Kansas, and sent to the defendant, purporting to assign said 575 shares of stock to "Mrs. Elizabeth J. Price or George E. Burton." These forms of assignments were received by the defendant January 22, 1929, apparently with no signatures guaranteed. The assignments were returned to the Brotherhood State Bank with the request that the signatures of the transferors be guaranteed. On February 1, 1929, defendant again received said assignments, with the signatures of Elizabeth J.

Price and George E. Burton guaranteed, but *no guaranty* of the signature of Lester W. Hurley.

On February 7, 1929, defendant *again* returned the forms of assignment, suggesting that the transferee designation be changed to joint tenancy, and *again* requesting that the *signature* of plaintiff be guaranteed. The change in the designation to joint tenancy was made without any knowledge or authority on the part of the plaintiff, and the fact that this change was made was fully known to the defendant for plaintiff's purported signature was on the instruments prior to the change in the form of assignment.

Then on February 19, 1929, defendant received the forms of assignment with the alteration which changed completely the legal effect of the instruments, and for this reason alone rendered them void, with the guarantee of the purported signature of Lester *W*. Hurley. On the basis of these altered instruments, and without any inquiry whatever as to the irregular and unusual reluctance to guarantee the purported signature of the plaintiff, all of said stock was transferred on the books of the company.

These transfers, therefore, were made on assignments that the defendant knew were altered; that said alterations were made without plaintiff's consent (Tr. R., p. 40); that defendant made no inquiry of plaintiff concerning said alterations although plaintiff's address was of record with the defendant company (Tr. R., p. 40).

The great majority of the authorities agree that an alteration made under such conditions vitiates the instrument. In the case of *Davis* v. *Eppler,* 38 Kan. 629, l. c. 633, 16 Pac. 793, the rule is stated:

> "It is the policy of the law to allow no tampering with written instruments. The holder of a note has no right to alter it without the consent of all the parties interested, and such unwarranted alteration

should make it null in his hands, no matter how pure his motives may have been in making the alteration." *Insurance Company* v. *Martindale,* 75 Kan. 142, l. c. 146, 88 Pac. 559; *Commonwealth National Bank* v. *Baughman,* 27 Okla. 175, 177, 111 P. 332.

2 C. J. 1174, Sec. 4, states the rule to be:

> "The rule supported by the great weight of authority is that if the legal import and effect of the instrument is in fact changed, it does not matter how trivial the change may be, or whether it may be beneficial or detrimental to the party sought to be charged on the contract * * * As a general rule any material alteration of a written instrument after its execution by a party claiming thereunder or with privity, without the authority or consent of the other party or parties to the instrument, invalidates the instrument."

It further appears that all of these assignments bore the purported signature of Lester *W*. Hurley (Tr. R., p 26), whereas the stock was issued to Lester Hurley (Tr. R., p. 36), and therefore the acceptance of said assignments was in violation of the company's rule that assignments must be executed exactly as the name appears on the face of the certificate to be properly executed assignments. As stated by the trial court "the defendant accepted anything."

It cannot be said that the defendant is without notice or knowledge of the fraud involved in these assignments, which embrace actual forgery, when it accepted and acted on the assignments with knowledge of the fact that they were not properly executed assignments. Further, that they were signed under such circumstances as to give the company notice that they were invalid by reason of spoilation and alteration subsequent to the purported signing.

It must also be remembered that defendant must have known that plaintiff was entitled to the issue in his name of the stock warrants provided for in resolutions of the company and the letter explanatory thereof (Finding XXVIII, Tr. R., p. 57). No warrants were so issued and all information was concealed from him.

The rule of law applicable to this situation is stated in *Karke* v. *Bingham,* 123 Calif. 163, 55 Pac. 759, as follows:

> "This is but the declaration of the equitable rule enunciated in Section 19 of the Civil Code. Every person who has actual notice of circumstances to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact."

> *Lady Washington Consolidated* v. *Wood,* 113 Calif. 842, 45 Pac. 809.

It is evident that by the exercise of a fractional part of the diligence the defendant owed to the plaintiff as trustee of his property that it could have ascertained and become fully informed of the fraud being perpetrated upon the plaintiff.

It had ample reason for distrust and suspicion, as well as the opportunity and means of securing full information. When plaintiff finally learned of the fraud, the plaintiff responded by telegraph, and immediately disaffirmed all of said transactions (Tr. R., p. 47). The defendant therefore stands convicted of knowing or having reason to know of the fraud and irregularity involved in said assignments, and for this reason alone the defense now relied upon California Civil Code, Section 1475, does not and cannot apply.

(B) Constructive or imputed notice of fraud.

It has been found and conclusively determined that the purported signatures of Lester *W.* Hurley appearing on the assignments of the 575 shares of stock are forgeries, and that this finding is final, binding and *res adjudicata* between plaintiff and defendant herein (Finding XVII, Tr. R., p. 50, and Conclusion of Law I, Tr. R., p. 58).

All cash dividends on said stock, as well as all stock rights, were paid to Elizabeth J. Price after said forged instruments were received by the defendant. The question therefore arises as to whether or not said payments so made on these shares were made with constructive or imputed notice of fraud being perpetrated against plaintiff by the use of said forged instruments.

There can be no question but that the law places a duty on a corporation to make no transfer of stock on its books or to otherwise so act as to destroy the rights or interest of a stockholder except on a *genuine signature* of a stockholder authorizing the action taken.

Confining our attention, however, to the effect of the forgery itself, on the question of knowledge on the part of defendant as to the fraud involved, it becomes immediately evident that forgery as distinguished from fraud of other types and character carry notice of the fraud on its face. Forgery does not require outside or independent information to advise or to inform the defendant company that fraud was involved.

A forgery does not become a forgery when it is discovered and pointed out to a party, but it is a forgery from the very time the spurious signature was placed on the instrument and the party dealing with that signature is bound as a matter of law to know that it is a forgery. If he acts on said forged signature, he does so at his peril.

The defendant company well knew this to be the law,

and for that reason is protected itself in the first instance by repeatedly demanding a guarantee of the plaintiff's signature. The forged instrument *ipso facto* carried positive, definite, and legal knowledge, and notice of the fraud, from which defendant cannot exonerate or excuse itself, on the claim that it thought, if it did, that the signatures were genuine.

The forged instruments *ab initio* carried home to the company the same knowledge that the plaintiff was being defrauded and his rights destroyed as a matter of law, that would have been carried home to the company if they had had a direct communication from any source that the instruments were forgeries.

Now, if the defendant company can say that it is exonerated or excused from the effects or injuries produced by reason of forgery, even though by guarantees, it protected itself from financial loss produced as a result of the forgery, and yet by the claim of ignorance or lack of knowledge that the instrument is forged, relieve itself, and place upon the victim of the forgery the loss in any respect incident thereto, it is evident that ignorance becomes a shield, and lack of diligence a virtue.

A forged assignment is the same as no assignment at all, and the company acting thereon incurred the same liability, and is charged with the same legal responsibility, and the same knowledge, as if the assignments were blank and bore no signature of the party whatever.

When a forgery exists the party acting upon the forged instrument is charged with the same knowledge as a matter of law, except for possible *mala fides,* as would be the case if he had actual knowledge and understood the instrument was a forgery in fact. This is the universal holding on this point, and it is based on the law that a *corporation is bound to know the signature of a stockholder* when the same is submitted to it, and the language

of the court in the case of *Telegraph Company* v. *Davenport,* 97 U. S. 369, is directly in point:

> "Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of the stock books and it is their duty to see that all transfers of shares are properly made either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. In many instances they may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who has perhaps acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of law, requires in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the safety of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can fall in cases of unlawful appropriation of property upon those who have been misled and defrauded. Decree affirmed."

To the same effect in *Chicago Edison Company* v. *Fay,* 164 Ill. 323, l. c. 328, 45 N. E. 534. This was a case

wherein stock was transferred by a corporation upon forged assignment. The court said:

> "The decree below was right, and was properly affirmed by the Appellate Court. Appellant acted at its peril in cancelling Fay's certificate of stock and in issuing to others other certificates therefor on forged assignments. Forgery can confer no rights or authority upon anybody. I Cook on Stockholders, section 365; *Telegraph Company* v. *Davenport,* 97 U. S. 369."

In the case of *Cooper* v. *Spring Valley Water Company,* 171 Cal. 158, 153 Pac. 936, the court said:

> "Its action in transferring the stock would operate to clothe the transferee with the apparently legal title to the stock. It was, therefore, bound to exercise good faith in its determination of the matter. It elected in the present instance to accept the bank as the owner, and in doing so it admitted that its right to make the transfer at the request of the bank depended on the question whether Terrill previously had the right to possession of the certificate, or whether that right was vested in the Lockhead estate. In accepting from this source the certificate issued to Lockhead and making a transfer thereof to the bank, the *defendant became the medium by which the title claimed by Terrill was transferred to the bank.* In legal effect the title passed from Terrill to defendant for the purpose of transfer, and from the defendant to the bank. For the moment of time necessary for the title to pass through it from Terrill to the bank it was the successor of Terrill. Its conduct could be based only on Terrill's right." (Emphasis ours.)

The case of *Tafft* v. *Presidio Railroad Company,* 84 Cal. 131, 24 Pac. 436, is directly in point. The court said:

> "Respondent had a right to rely on the observance by appellant of its own by-laws and the laws of the

state in the transaction of its business. Appellant was under no obligation to permit a transfer until the requirements of its by-laws and the laws of the state were fully complied with. A purchaser of stock does not receive the certificate of his vendor, but a new one, made out in his own name and reciting nothing contained in the former. He is therefore portected in the enjoyment of his purchase even though there was no right to make the transfer to him. For this reason an unauthorized transfer is a wrong done to the owner of the stock, for which not only the person who makes it, but anyone knowingly assisting in the wrong, is responsible. The bank or other corporation, and also these defendants, are trustees to a certain extent to the stockholders—that is, for the protection of individual interests—cannot be denied. They are alike trustees of the property and of the title of each owner."

The court further held:

"Appellant invokes the familiar rule 'that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same,' but it was the appellant in this case who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it. As was said in *Bayard* v. *Farmers & Mechanics Bank,* 52 Pa. State, 232."

"With them (the corporation) was the registry and transfers could be made only with their consent, by the surrender of the certificates and the issue of new ones * * * as respondent was divested of her property by the unauthorized act of appellant it must be held responsible to her for the damage she has suffered in consequence of such wrongful act."

In the case of *Chew and Goldsborough* v. *The Bank of Baltimore,* 14 Ed. Reports 299, the controlling facts are

very similar to those involved in the case at bar. In this case Chew Schnebly, Administrator, obtained from Lowman Chew, an infant of unsound mind, a bill of sale and power of attorney for certain shares of stock in the defendant company and, without paying any consideration therefor, presented said power of attorney to the defendant company and secured a transfer of said stock to himself on the company's books. Suit was brought to recover said stock on behalf of said infant, and the dividends. In its opinion the court said:

> "As we understand the case, the charge of fraud is made against Schnebly alone, though it is alleged that, *by construction of law,* the bank is responsible for the consequences of the means employed by Schnebly to obtain the transfer, for the reason that the papers presented by Schnebly, and on which the transfer was made, did not show that he had legal authority for doing what he proposed to do. There is no averment that the bank had any agency in procuring the execution of the bill of sale. On the contrary, the procurement is ascribed to Schnebly, and the bank is charged with liability, by reason of the mental imbecility of Chew, rendering that paper null and void. As to the fraud, the case is made out against Schnebly, and against the bank, as to the charges on which its responsibility was said to depend. We do not consider the bill as having charged fraud, in fact, against the bank, and, it is proper to add, that its conduct in the matter is not open to censure on that ground, however incautious its officers may have been in recognizing papers of the validity of which they had no knowledge. * * * The case does not show that Chew received one cent for the stock. * * * The bank cannot say that Lowman Chew appeared to be sane, and that there was nothing to excite suspicion as to the state of his mind, for its officers dealt with Schnebly without even seeing Lowman Chew, and if misled or deceived by Schnebly, the consequences

ought not to fall on Chew. It is true that transfers may be made under power of attorney, but this means a *valid power,* and the bank takes the risk depending on its execution. * * * In case of forged powers the bank is liable and so as to the acts of *femes covert* and infants. In all such instances, it may be said that everything appeared to be fair and plain; *that the officers did not know the instrument was forged,* or that the party was a married woman or an infant, yet the corporation must meet the consequences, because the law declares that *forged instruments are void,* that married women are not *sui juris,* and that infants are incapable to contract except in specified cases. According to the established doctrine, the acts of lunatics and infants are treated as analogous, and, in this view of the case, the transfer may be avoided. In all these instances, there may be no actual fault on the part of the bank, but the legal conclusion results from the justice and expediency, in such transactions of casting the loss on those who can best provide against it. A bank may refuse to recognize the power of attorney if not satisfied of its entire genuineness. It may require the personal attendance of the party, for the very purpose of determining such matters of fact as may give rise to disputes." (Emphasis ours.)

The principle of law that a corporation is charged with knowledge and bound to know the signature of a stockholder is the same thing as saying it is bound to know a spurious or forged signature of a stockholder. That which a corporation is bound to know embraces, of necessity, knowledge of the fact. The defendant was bound to know that plaintiff was a minor. *Lee* v. *Hibernia Savings Society,* 177 Cal. 656, 171 Pac. 677; *Williams* v. *Leon T. Shettler Co.,* 98 Cal. App. 282, 276 Pac. 1065.

The same principle of law is applied to banks. A bank is bound to know the signatures of its depositors. The

forged signature of a depositor on a check carries knowledge to the bank that the check is fraudulent, of which fact the bank is charged with knowledge.

The case of *First National Bank* v. *Allen,* 100 Ala. 476, 14 So. Rep. 335, declares the rule:

> "The correct principles by which the respective liabilities of a bank and depositor are determined are these. The bank is bound to know the signatures of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against a depositor."

The phrase, "however skillfully executed," indicates clearly that it is immaterial whether or not the bank had actual knowledge or realization that the signature was a forgery. It is held to have had knowledge of that fact, regardless of how artfully it may have been deceived. *Bank of Brunswick* v. *Thompson* (N. C.), 93 S. E. Rep. 849.

In the case of *Trust Company* v. *Bank,* 154 Mo. App. 89, l. c. 100, 133 S. W. 357, the court states the rule to be:

> "The law is well settled that a bank is *conclusively presumed* and bound to know the signature of its customer when the signature appears as drawer on a check, drawn upon that bank purporting to be signed by the customer." (Emphasis ours.)

7 C. J. 683 is to the same effect.

As above indicated, there can be no doubt that the same duty rests on a corporation to know the signature of a stockholder as that which rests upon a bank to know the signature of its depositor. The forged signature therefore, in and of itself, carried notice to the defendant of the fraud which was inherent in the forgery, and therefore

created that which must be taken to be the legal equivalent of direct knowledge.

In other words, forgery by necessary implication involves fraud, and since the law binds a corporation to know the signatures of its stockholders, a corporation that acts on a forged signature must be held to have acted with notice and knowledge of the fraud embraced in the forgery.

The conclusion is unavoidable that since all payments were made after the forged assignments were received, said payments were made with legal notice and knowledge that a fraud was being perpetrated by Elizabeth J. Price on the plaintiff herein, and consequently on the basis of this fact alone, Section 1475 of the Civil Code of California has no application. Restatement of Contracts, Sec. 131 (2).

V.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) for the reason that defendant had actual knowledge as a matter of fact and law that plaintiff was being excluded from the dividends and stock rights and this exclusion is the fraud that is referred to in the exception read into Sec. 1475, Civ. Code, by the decisions.

We have considered above under point IV the question of defendant's knowledge, actual or constructive, of the fraud perpetrated by Elizabth J. Price against the plaintiff. In so doing, we have confined our analyzation of the point to the question of the defendant's knowledge of the actual fraudulent acts—forgery—deceit—alteration and concealment practiced.

However, a careful reading of Section 1475, Civ. Code of Calif., together with the decisions applying said statute, will immediately disclose that while such fraud

will preclude reliance on the statute, the exception to said statute is not limited to or based upon knowledge of this character of fraud. The exception read into the statute as it applies to the discharge of an obligation to joint credits is knowledge of the *fraud of exclusion* of one joint creditor from the benefits of a joint fund.

As in the case of the Statute of Frauds and other statutes, by decisions going back to the earliest of English Reports, an exception has been read into the rule sought to be covered by Section 1475 of the Civ. Code of Calif., precluding its application where the obligor knows, or has reason to know, that fraud is being perpetrated. The fraud in this instance is that which is involved in the exclusion of benefit of the joint creditors, as shown in the illustration given in Restatement, Contracts, Sec. 131, p. 149.

> "A, B and C are severally, jointly, or jointly and severally entitled to have D pay them $1,000. The money when received by them is by their arrangement with one another, to be shared equally. D knows of this arrangement. A gives D either a release which purports to discharge A's individual right, or a release which purports to discharge the rights of A, B and C. The consideration in either case *is a discharge by D of a claim which is due him from A individually.* The release operates as a satisfaction of only the one-third interest of A in the performance due from D." (Emphasis ours.)

This illustration finds support and approval in the ase of *Stark* v. *Coker,* 20 Calif. (2d) 839, l. c. 844, 129 'ac. (2d) 390, 393, wherein one joint tenant secured rom the obligors for his own benefit notes in the discharge of the entire obligation.

The court, after quoting Civ. Code, Section 1475, said:

> "That rule (Sec. 1475) cannot be applied under the circumstances presented here. The note was made payable on its face to plaintiff and Hilda Stark as joint tenants. * * * Defendant having executed these instruments, will be deemed to have known the authority of those persons as to each other with respect to one of them entering into an accord and satisfaction of the debt. Plaintiff had no knowledge of the purported accord and satisfaction, and did not authorize it. * * * One of the characteristics of joint tenancy is equality of the interest held by the respective tenants (Civ. Code, Sec. 683), and defendants by giving the note and deed of trust were advised of that rule. It has been consistently held that one joint tenant has not by reason of the relationship any authority to bind his co-tenant with respect to the latter's interest in common property" (citing many cases).

The Stark case, *supra,* is the last direct decision on the point in California. It follows that since a joint tenant has no authority to bind the excluded joint tenant to a discharge of the obligation where the obligor knows of the exclusion, as in the case at bar, Civ. Code, Sec. 1475, constitutes no defense.

Again, in the case of *Cober* v. *Connolley,* 20 Calif. (2d) 741, 128 Pac. (2d) 591, where Sec. 1475 of the Civ. Code is applied, the facts involved failed to create the basis for the exception applied in *Stark* v. *Coker, supra.*

In this case payment was made to one of the joint tenants in a note without knowledge of the other joint tenant. The obligor likewise had no knowledge of the fact that the joint tenant to whom payment was made was excluding his co-tenant from benefiting therefrom. The court said:

> "The appellants do not claim that Cober did not give value, or that they had knowledge concerning Eversole's failure to account to the other payee of the note."

The basis for the distinction as to the application of the rule of Civ. Code, Sec. 1475, in the two cases is therefore readily apparent. In the case at bar when the stock was transferred out of plaintiff's name, knowledge was necessarily brought home to the defendant that plaintiff was being *excluded,* and when payment was made on authority of Dividend Order No. 12743 on the 88 and 191 shares of stock (Finding XX, Tr. R., p. 53) it was likewise apparent to defendant that plaintiff was being *excluded,* and the rule laid down in *Stark* v. *Coker* is controlling.

Probably the leading case on which the exception is predicated is the early decision of *Lemiette* v. *Starr,* 33 N. W. 832, 833, 66 Mich. 539.

There in a suit on a note it was asserted by the defendant that a co-obligee had accepted a new note covering the indebtedness, which latter note was not due. However, there as here, notice had been imparted that the obligee in accepting the second note intended to exclude his co-obligee from its benefit. What the court said in rejecting the defense and holding the original obligation to be satisfied therefore should control here. It was pointed out:

> "They had requested him to pay it on several occasions, and, while promising to do so, he had never fulfilled the promise. Soon after the suit against the Keystone Company was ended, the plaintiffs, being both together, requested defendant to give them security upon his house and lot. This he refused to do, but offered to give them his note, which they refused to take; and so the matter ran on until March, 1886, when, as defendant testifies, he had several conver-

> sations with Mr. Lemiette, who asked him for the money, and he told him that he could not pay him, and he then asked him to give him his note, said he wanted it for the balance due him and Richards, and he told him that he would give it to him for a year; that Mr. Lemiette *wanted the note given in his name;* that he was *claiming all the time that Richards had got most of his pay, and there was nothing coming to him,* and so he gave him the note *in his individual name."* (Emphasis ours.)

The court held:

> "The partnership relation did not authorize Lemiette, as agent of Richards and himself, to take a note *in his own name intended for his individual use.* It was outside of the scope of the partnership business, and beyond the authority of a partner in closing up the affairs of the partnership. He could not, by collusion with the debtor of the firm, obtain a security *in his own* name, and *for his own benefit, to the exclusion of his partner."* (Emphasis ours.)

This holding would apply with even greater force where, as here, the stock was transferred entirely out of Hurley's name. Certainly the defendant then knew Hurley was being *excluded,* thus precluding reliance on Section 1475.

VI.

The court erred in its Conclusion of Law XI (Tr. R., p. 62) that neither dividends nor stock rights constituted deposits in the hands of defendant, for the reason that when said dividends are set aside they are paid to the company as a deposit and the exception as to deposits stated in Sec. 1475, Civ. Code, applies.

Section 1475 in its entirety, including its caption, appears in the California Civil Code as follows:

> "Section 1475. Performance to one of joint *creditors.* An obligation in favor of several persons is extinguished by performance rendered to any of them, *except in the case of a deposit* by owners in common, or in joint ownership, *which is regulated* by the title on deposit. (Enacted 1872.)" (Emphasis ours.)

It will be observed first that the section heading refers o performance to one of joint "creditors." Furthermore, s shown herein, "setting aside" the dividend placed the lividend in trust and in the category of "deposits" reguated only "by the title on deposits." Not only does the xpress exception set forth in Section 1475 exclude deosits, but it will also be shown that the title on deposits ikewise precludes application of Section 1475 by setting p conflicting rules as to performance.

(A) Setting aside the dividend created a deposit subject to the ules in the title on that subject.

It has been expressly held that dividends of a corporaion when declared are like "special deposits of a bank," vhether viewed as held as "trustees or agents," and it is or that very reason that the Statute of Limitations does iot run against the claim for the dividends until after lemand has been made. (Except where the language of he Code clearly departs from the common law, it will be onstrued in the light of common law decisions. *Estate f Elizalde,* 182 Cal. 427, 432, 188 Pac. 560. This Court is, f course, bound by the exception declared by the highest ourt of California in *Cober* v. *Connolly,* 20 Cal. (2d) 741, 45, 128 Pac. (2d) 591.) This was the holding in, and the vords quoted are from, *Scott* v. *New York Life Insurance o.* (La., 1944), 16 So. (2d) 685, 686 (point 2).

At least this is the unquestioned holding once the diviends have been set aside. *In Re Associated Gas Co.,* C.

C. A. (2d), 137 Fed. (2d) 607, 610; *In Re Interborough Consol. Corp.*, C. C. A. (2d), 288 Fed. 334 (cert. denied, 67 L. Ed. 1215); *In Re Sutherland,* C. C. A. (2d), 23 Fed. (2d) 595; *McLaren* v. *Crescent Planing Co.*, 93 S. W. 819, 821; 18 C. J. S., Sec. 467, page 1115, Note 5. Compare, also *MacDermot* v. *Hays,* 175 Cal. 95, 114, 118, 170 Pac. 616; *Smith* v. *Taeckor,* 133 Cal. App. 351, 352-3, 24 Pac. (2d) 182.

In the McLaren case, *supra,* it is held that "setting apart of such a fund is a payment to the corporation as trustee for the use of the stockholder."

Whenever money has been set aside for a "specific and definite purpose" it is a deposit subject to the Code title on that subject. It was so held in *Ennis-Brown Co.* v. *Richdale Land Co.*, 47 Cal. App. 508, 510-11, 190 Pac. 1064.

In that case $4500 was sent by check to the one holding a mortgage on growing crops with direction that the money should be applied to the purchase of the crop, a contract with the grower having been previously made by the sender, calling for a down payment in that amount. The crop having been below the original estimate an excess remained over what had been called for by the contract. In the action brought for the excess the question was whether the action could be maintained against the mortgagee, to whom the money was given, or the holder of the crop with whom the contract of purchase had been made. In holding the mortgagee liable the court found it necessary to define the relation created and the Code title applicable. It was there said:

> "The acceptance of the money for a definite purpose carries the implication that it would be used for that purpose. This seems too plain to require argument." (*Ennis-Brown Co.* v. *Richdale L. Co.*, 47 Cal. App. 510.)

And again:

> "We need not quibble as to the proper legal terminology to characterize the relation of the parties. In a general sense, though, *it is proper to say that a trust was created by express agreement,* and it imposed upon defendant the obligation to pursue the course we have indicated. More specifically stated, the Richdale Land Company became a voluntary *depositary within the meaning of Section 1874 of the Civil Code, providing:* 'A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depositary.' " *(Ennis-Brown Co.* v. *Richdale L. Co.,* 47 Cal. App. 511.) (Emphasis ours.)

And continuing, the court said:

> "Appellant makes the mistake of supposing that the case involves a general deposit, whereas, we are dealing with a special deposit. It is special because it was limited to *a specific and definite purpose.* The title did not pass to defendant as it would have done if the deposit had been general in its nature. The deposit constituted a bailment with the title remaining in the bailor and the bailee acquired no right to make general use of the property. The distinction between the two kinds of deposits is clearly pointed out in *Anderson* v. *Pacific Bank,* 112 Cal. 601 (53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063), and *People* v. *California, etc., Trust Co.,* 23 Cal. App. 199 (137 Pac. 1111, 1115)." *(Ennis-Brown Co.* v. *Richdale L. Co.,* 47 Cal. App. 511). A more recent case is *Burket* v. *Bank of Hollywood,* 9 Cal. (2d) 113. *Perkins* v. *Benquet Consol. Mining Co.,* 55 Cal. App. (2d) 720, 132 Pac. (2d) 70, l. c. 84.

In the Burket case, *supra,* the bank, in its escrow department, held moneys which under the terms of the es-

crow were to be paid to Burket. Checks were so issued but the bank failed before the checks were honored. In determining that the claim thereon should be be paid on a preferred basis over general creditors, the court held:

> "These records clearly show that the money on deposit in the escrow account at the time the bank closed its doors was no part of the general assets, but had been entrusted to it for distribution in accordance with an escrow agreement. Under such circumstances it was *a special deposit,* title to which did not pass to the bank (citing cases). Being a special deposit, the owners are entitled to it in preference to the bank's general creditors and the original claims filed with the superintendent of banks are a sufficient basis for recovery." (*Burket* v. *Bank of Hollywood,* 9 Cal. (2d) 116.)

To the same effect: *Anderson* v. *Pacific Bank,* 112 Cal. 598, 600-1, 44 Pac. 1063 (money deposited as security); *Bank of America* v. *California Bank,* 218 Cal. 261, 274, 22 Pac. (2d) 704 (being money due through an escrow).

As pointed out in the last cited case, it is not necessary that the money be held in kind to be a deposit.

In the case of *Jerome* v. *Cogswell,* 204 U. S. 1., the court said:

> "It follows, as held, that the transfer of shares after the reduction of June 9, 1900, did not carry any right to an interest in the special trust fund, the proportionate interest therein having vested in the then stockholders as dividends."

(B) The title on deposit of itself likewise precludes reliance on Section 1475.

The reason for the express exception of deposits contained in Section 1475 is obvious. The nature of the trans-

ction calls for additional responsibility and care. No scrow holder and no corporation would issue a check one of several persons jointly entitled to receive moneys y way of dividend or through the escrow without specific uthorization of the others.

The section on deposits precludes reliance on Section 475 by setting up a different measure of responsibility. may be noted that Sections 1822 and 1823 of the Civil ode under this title, as in the case of the law on stock ividends, provide that delivery must be made on demand ut need not be made prior thereto. Section 1827 of the ivil Code under this title specifically covers the obligaon of the depositary where the property to be delivered owned either "*jointly* or in common." That section prodes:

> "Section 1827. Delivery of thing owned jointly, etc. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the *depositary may deliver to each his proper share thereof,* if it can be done without injury to the thing." (Enacted 1872.)

As permitted by that section, the defendant herein could ave delivered to each of the joint owners "*his proper are* thereof," since it could have been done without inry to what was to be delivered. The enumeration of this ethod under familiar rules of construction excluded the her now sought to be relied upon.

Section 1828 enumerates another exception which would rmit the delivery of the whole to one of several joint vners, but this section expressly limits this privilege where the deposited sum is made deliverable or payle "to *either* or to their survivor." In other words, a ecial authorization must be had permitting the depositry to deliver to "either" before that can be done.

The defendant herein by its conduct indicated its realization that it must comply with these sections for, according to its own admissions, when it was advised that Hurley was to be excluded, it, in turn, called for a written direction (divided orders) permitting it to pay to Mrs. Price alone (Tr. R., p 27d). These orders being invalid the depositary is not exonerated, and none of the defendant resolutions and none of the stock certificates contained "the either or clause" which was essential to application of Section 1828. (The exception of fraud by decisions discussed herein would also apply to these sections.)

VII.

The court erred in its Conclusion of Law XI (Tr. R., p. 62), for the reason that defendant not only knew that plaintiff was being excluded from payment of dividends and stock rights, but violated its own resolutions in failing to issue warrants in plaintiff's name and give information required by said resolutions.

It has been pointed out above that by provision of resolutions passed by the company (Tr. R., p. 57), that plaintiff was entitled to have issued in his name and delivered to him stock warrants covering said stock rights, together with a letter explanatory of said rights. These warrants, however, were issued and delivered, as shown by the admission of the defendant, to Elizabeth J. Price (Tr. R., pp. 26, 45, 53).

On the basis of these facts it appears that defendant not only knew that plaintiff was being excluded from all interest in all dividends and stock rights, but that defendant was violating its own resolutions by failing to issue and deliver said warrants to plaintiff on stock standing in his name on defendant's books. In further violation of plaintiff's rights defendant actually suppressed and con-

cealed from the plaintiff information to which plaintiff was entitled.

This violation by defendant of its own resolutions and the concealment of information connected therewith, directly contributed to and made possible the misappropriation of all of plaintiff's dividends and stock rights, both on the 88 and 191 shares of stock, standing in his name, as well as that which had been transferred out of his name.

It follows that by reason of this fraud and concealment alone, that the exception to Sec. 1475, Civ. Code of California, comes into operation and eliminates Sec. 1475 as a defense. Restatement of Contracts, Sec. 31 (2), page 149. *Stark* v. *Coker,* 20 Calif. (2d) 839, l. c. 844, 129 Pac. (2d) 390, 393.

VIII.

The trial court erred in its Conclusion of Law XII (Tr. R., p. 63) that plaintiff was not entitled to interest on dividends wrongfully paid to Elizabeth J. Price prior to the date of demand for the reason that demand would have been vain and was therefore waived.

In Conclusion of Law XII the court declared the law to be that plaintiff would not be entitled to interest prior to the date of his demand for payment of the dividends. This was error since it stands established by the court's Finding XIII (Tr. R., p. 45) and Finding XXII (Tr. R., p. 54), that plaintiff was at all times entitled to receive one-third of all the dividends and stock rights declared and set aside.

It is evident that since plaintiff's stock had been transferred on the books of the company and payment made on the basis of the invalid dividend No. 12743, that any earlier demand for the payment of said dividends would

have been ignored and disregarded, the same as the one which was made on October 15, 1945. For this reason under the law said demand would have been a useless act, and therefore not required.

The rule is well stated in *Perkins* v. *Banquet Consolidated Mining Company,* 55 Cal. App. (2d) 720, 132 P. (2d) 70, l. c. 99:

> "Interest is allowed after default by non-payment as part of the damages suffered by the party to whom payment is due. Section 3302, Civil Code; 8 Cal. Jur., p. 789, Sec. 48; 25 C. J. S. Damages, p. 535, Section 51; 30 Am. Jur., p. 6, Section 2."

It is true that it is the general rule that dividends do not bear interest until demand for payment; however, the Perkins case, *supra,* points out that wherever from the circumstances it is apparent that a demand would be fruitless it is not required. The Court said (132 Pac. (2d), l. c. 97):

> "The law does not require useless acts. A demand is not required where it is plain that it would be unavailing. See cases cited, 1 Cal. Jur., p. 343, Section 30. Interest was allowed in the Perkins case on each dividend from the date declared."

Sec. 3287, Civ. Code of Cal., provides:

> "Every person who is entitled to recover damages certain * * * is entitled also to recover interest thereon from that day * * *"

In the case at bar it is manifest that a demand by Hurley at any time after the transfer of the 575 shares on the books of defendant company on February 19, 1929, for the payment of the dividends and the delivery of the stock rights to him would have been unavailing.

Defendant from that time definitely disregarded Hur-ey's interests and ownership, not only as to dividends and stock rights before his title was established by suit in the case of *Burton* v. *Hurley* (Tr. R, p. 49), but has continued to disregard his right to said dividends and refused to comply with demands to pay and deliver the same, as well as the value of said stock rights, since his title was so established in the Kansas case.

It is clear therefore that interest is due the plaintiff on these dividends and on the value of these stock rights from date of payment to Elizabeth J. Price. Further, since demand for payment was impossible by reason of plaintiff's lack of knowledge, as well as by reason of the fact that it clearly would have been fruitless if made, such demand is not required.

The right of the plaintiff in the case at bar to interest as above stated is declared to be the law, 14 C. J. 777, Section 1177, as follows:

> "In addition to having his rights as a stockholder restored the owner may recover dividends which have been declared but not paid to him during the time his name did not appear on the corporation's records as a stockholder, with interest thereon."

(B) The plaintiff is likewise entitled to interest on the ividends declared and stock rights delivered to Eliza-eth J. Price on the 191 and the 88 shares that remained n the name of the plaintiff on the books of the company rom the time said payment and delivery was made for he reason that dividend order 12743 relied on by defend-nt as justification for said payments is and was at all mes void as constituting a declaration of power by a inor, as pointed out herein (Tr. of R., p. 60).

It follows from Finding of Fact XXVIII, Tr. R., p. 57, that by defendant's acts of concealment plaintiff was prevented from acquiring knowledge as to his rights to said dividends as well as his ownership in said stock and thus prevented from making demand for said dividends at any earlier time. Defendant, therefore, cannot *take advantage of its own wrong* and rely upon the lack of demand on the part of the plaintif for payment of said dividends. This concealment by defendant company of said stock rights and ownership of plaintiff's interest in said stock directly produced or contributed to plaintiff's loss of the dividends for all of these years and interest only constitutes payment for the loss thus inflicted.

It has repeatedly been held that fraud and concealment will prevent the running of the Statute of Limitations. Likewise, it has been held in the case of *Miles* v. *Bank of America, etc.,* 17 Calif. App. (2d) 397-8; 62 P. (2d) 177:

> "That when the act or promise of one person causes another in reliance thereon to do or forbear from doing a thing to his detriment, which he would have otherwise performed, the promissor is estopped from taking advantage of the act or omission."

Verdugo Canon Water v. *Verdugo,* 152 Calif. 655, l. c. 683 (93 Pac. 1021), *John V. Neff* v. *New York Life Insurance Co.* (April 26, 1946), 74 A. C. A. 208, l. c. 215, Restatement on the Law of Torts, Chapter 44, Sec. 478, Subdivision C, Chapter 44, Sec. 879.

The analogy by which the rules of law stated in the last above cited cases becomes applicable to the failure of the plaintiff to make demand for the payment of interest, is strikingly evident when it is realized that through the

violation by the defendant of its own resolutions (Tr. R, p. 57, Finding XXVIII), the plaintiff was prevented from acquiring knowledge of his interest in and ownership of in the stock in question, and likewise prevented from receiving the stock rights therein provided to be issued as warrants in his name. By this fraudulent concealment plaintiff was prevented from making demand, and thus the defendant is estopped to rely upon the rule requiring a demand to avoid the obligation to pay interest from the date each dividend is declared and set aside for payment.

Plaintiff was entitled to interest from the date each dividend was declared and set aside for payment.

IX.

The trial court erred in its Conclusion of Law XI (Tr. R., p. 2), for the reason that defendant was bound to know that laintiff was a minor, and Sec. 33, Civ. Code of California, recludes Sec. 1475, Civ. Code, from applying to minors.

It has been conclusively adjudged in the case at bar that the dividend orders executed in blank by plaintiff while he was a minor, were voidable (Tr. R, p. 60), under California and Missouri law, and did not constitute a discharge of defendant's liability to said minor plaintiff. Calif. Civ. Code, Sec. 33; *Hakes Investment Co.* v. *Lyons,* 166 Cal. 557, 137 Pac. 911 (1913); *Winkler* v. *Los Angeles Inv. Co.,* 43 Cal. App. 408, 185 Pac. 312 (1919); *Schram* v. *Poole,* 111 F. (2d) 725, 727 (C. C. A. 9th, 1940). Such acts of a minor are also held to be void *ab initio* under the law of Missouri. *Hodge* v. *Feiner,* 338 Mo. 268, 0 S. W. (2d) 90 (1935); *Curtis* v. *Alexander,* 257 S. W. 32, 436 (Mo. Sup. Ct. 1923); *Poston* v. *Williams,* 99 Mo. App. 513, 73 S. W. 1099 (1903); *Turner* v. *Bondalier,* 31

Mo. App. 582, 585-586 (1888): *Early* v. *Richardson*, 280 U. S. 496, 500 (1930); *Dexter* v. *Hall,* 15 Wall. (82 U. S.), 9, 26 (1872); 18 Am. St. Rep. 630-633; 31 A. L. R. (note) 1001-1021; 43 C. J. S. 84.

It is also the law of California that the defendant was bound to know that plaintiff was a minor. *Williams* v. *Leon T. Shettler Co.,* 98 Calif. App. 282; 276 Pac. 1065; *Lee* v. *Hibernia Savings Society,* 177 Cal. 656; 171 Pac. 677.

Now, since under Calif. Civ. Code, Sec. 33, and the cases cited, the plaintiff did not and could not discharge the defendant of its obligation by his own act, by what process of reasoning can it be said that Section 1475 of the Civ. Code works an involuntary discharge? Any such interpretation of the scope and effect of Section 1475 of the Civ. Code would be to repeal and nullify the force, effect and protection given to minors by Section 33 of the Calif. Civ. Code.

It certainly is not the law that the protection given by Sec. 33 of the Calif. Civ. Code is limited to minors, whose property is held in severalty, and does not in any manner protect the minor or his property in the event that the minor holds property in joint tenancy. To so construe the law would be to establish the rule that a minor can be deprived of his property indirectly by force of Sec. 1475, Civ. Code, though he cannot be deprived of his property directly by his own act. This is not the law, and we have found no case that so holds.

It has not only been held that defendant was bound to know that plaintiff was a minor, but the law is well established that "one deals with infants at his peril." *Pollock* v. *Industrial Acc. Commission,* 5 Calif. (2d) 205, 211, 54 Pac. (2d) 695. In this case the obligor was required to pay twice.

In the case of *Burnand* v. *Irigoyen,* 30 Calif. (2d) 681; 86 Pac. (2d) 417, the court said:

> "The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others."

In the case of *Turner* v. *Bondalier,* 37 Mo. App. 536, he court says:

> "The deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. * * * It has repeatedly been determined that a power of attorney made by an infant is void. * * * In fact, we know of no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable."

In the case of *Armitage* v. *Jesse C. Widoe,* 36 Mich. 24, in which the opinion was written by Cooley, C. J., n indirect effort to deprive an infant of his property as involved. The court said:

> "It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; if one has only to change the order of proceeding, assume to act for the infant first, and get his authority afterwards, and the principle of law which denies him the power to give the authority is subverted by such a doctrine and is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods." 43 C. J. S. 130, Sec. 53.

It follows from the above that no indirect method, ther as to the form in which an infant's property is

held, or otherwise, can be resorted to for the purpose of destroying his ownership. That where a discharge is claimed under Section 1475 of the Civ. Code, by payment to one of several joint creditors, *it must be made to appear that all joint creditors are sui juris.*

If this is not the law, then Section 1475 of the Civ. Code is turned into a means of oppression and the destruction of the rights of a minor, the protection of which the law looks upon with such favor and concern. Such a ruling would be in conflict with all the authorities on the subject. It must be evident that Section 1475 of the Civ. Code was not enacted, and cannot be construed, to provide a means and method for the destruction of the very protection thrown around infants by Sec. 33 of the Calif. Civ. Code.

Conclusion.

That defendant is bound and estopped by its answer, and the admissions made, to rely on Section 1475 of the Civil Code as a defense. That its present position convicts it of actual knowledge of the invalidity of the assignments and dividend orders; that the forged assignments carried notice and legal knowledge *ab initio* of the fraud being perpetrated against the plaintiff; that defendant knew of the alteration and invalidity of the assignments which gave further knowledge of the fraud being perpetrated against the plaintiff; that the fraud of exclusion was being worked against plaintiff; that plaintiff was a minor and defendant could not be discharged of its obligation to him under Sec. 1475 of the Civil Code, as said section only operates as to parties *sui juris;* that for each and all of these reasons and others set out above Section 1475 of the Civil Code con-

itutes no defense and plaintiff is entitled to judgment
or the amount of said dividends and stock rights to-
ether with interest at the rate of 7% from the date each
vidend and stock right was declared and set aside for
ayment.

Respectfully submitted,

Thurman L. McCormick,
910 Rialto Building, K. C., Mo.,
Harold Easton,
633 Roosevelt Building,
Los Angeles 14, California,
Attorneys for Appellant.